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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DEON RAY MOODY, a Minor, etc., et al., Plaintiffs and Appellants, v. GREGORY BEDFORD, Jr. et al., Defendants and Respondents.	B226074 (Los Angeles County Super. Ct. No. TC023251)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, William P. Barry, Judge. Reversed.

Jeffrey S. Pop & Associates, Minh T. Nguyen for Plaintiffs and Appellants.

Manning & Kass, Ellrod, Ramirez, Trester, Dennis B. Kass, and Kevin H. Louth for Defendants and Respondents.

INTRODUCTION

Plaintiffs are the minor surviving children of the decedent mother and their guardian ad litem.[1] They filed a wrongful death action against defendants arising out of a head-on automobile collision that killed the mother. The trial court granted summary judgment in favor of defendants pursuant to the so-called one-action rule (Code Civ. Proc., § 377.60), concluding that an insurer's prelitigation, policy-limits settlement of a wrongful death insurance claim with one heir, who had represented that she was the only heir,[2] barred plaintiffs' subsequent wrongful death action.

We agree with plaintiffs that the one-action rule does not apply to the prelitigation settlement in issue and therefore does not bar plaintiffs' wrongful death claims against defendants. Accordingly, we reverse the order granting summary judgment and the judgment based on it.

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1 Plaintiffs Emily Stuhlbarg, as guardian ad litem, Deon Ray Moody, Diamond Lue Moody, Damian Ray J. Moody, Desmen Ray Moody and Dezaray Moody are referred to collectively as plaintiffs.

2 The insurance claim was made against defendants by the minor plaintiffs' adult half-sister who represented to the insurer that she was mother's only heir.

BACKGROUND[3]

Corinthia Hood (mother), the minor plaintiffs' mother, died in a head-on collision between the automobile in which she was a passenger and an automobile driven by defendant Gregory Bedford and owned by defendant Patricia Boyce.[4] Corisha Brown[5] is mother's adult daughter and the half-sister of the minor plaintiffs. Brown tendered a claim to Permanent General Assurance Corporation (Permanent General)—the company that insured defendants—arising out of the collision that killed mother. Attorney Gregory Yates represented Brown in connection with her claim against defendants. Gregory Hill of Permanent General handled Brown's claim from the time it was tendered until it was settled in May 2008.

Hill sent a letter to Yates advising that Permanent General was offering to settle Brown's claim for the full policy limits of $100,000. In the letter, Hill requested, inter alia, that Yates provide the identities of any and all of mother's heirs. Yates's office staff thereafter informed Hill that Brown had accepted Permanent General's settlement offer. Hill responded that he would need to ascertain all of mother's surviving heirs before the settlement and release agreement could be prepared and executed. In response, Brown

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[3] The facts are taken from defendants' separate statement of undisputed facts, which facts were largely undisputed by plaintiffs in the trial court. Although plaintiffs, in their separate statement, purported to dispute certain of the facts on which the summary judgment motion was made, they based those purported disputes either on evidentiary objections or legal disputes concerning the interpretation of a release agreement. Because the trial court overruled all of plaintiffs' evidentiary objections, and plaintiffs do not challenge those rulings on appeal, the trial court properly rejected any purported factual disputes based on such objections. Also, the trial court properly rejected any purported factual disputes based on contract interpretation grounds because such disputes were legal rather than factual.

[4] Defendants Gregory Bedford and Patricia Boyce are referred to collectively as defendants.

[5] Nominal defendant Corisha Brown is referred to as Brown.

represented to Yates that she was mother's sole surviving heir, and, based on that representation, Yates represented to Hill that Brown was the sole surviving heir of mother.

Yates also informed Hill that no estate was being opened for mother and that, by settling with Brown, Permanent General would be settling all claims with all of mother's surviving heirs. Hill had emphasized to Yates and his office staff that Permanent General could not enter into the release and settlement agreement with Brown until all of mother's surviving heirs had been ascertained and made parties to that agreement. Yates told Hill that he understood Permanent General's position with regard to that issue and again represented to Hill that Brown was mother's sole surviving heir.

Based on Yates's representation that Brown was the sole surviving heir of mother, and after receiving a signed declaration from Brown under Code of Civil Procedure section 377.32 regarding Brown's right to settle mother's survival action, Hill wrote a letter to Yates confirming Permanent General's understanding that Brown was mother's sole surviving heir. Hill enclosed a "Release of All Claims" with the letter to Yates. The release contained Permanent General's standard release language and required that Brown execute it as the "sole surviving heir of [mother]." At no time prior to Brown entering into the release did Yates or Brown have a conversation with anyone during which Brown's status as sole surviving heir of mother was limited, circumscribed, or qualified in any way.[6]

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6 The introduction to the release provided in pertinent part: "I, [Brown] daughter and sole surviving heir of [mother] (Deceased) being of lawful age . . . ." Plaintiffs contend that the phrase "being of lawful age" modifies the phrase "sole surviving heir" and thereby qualifies Brown's status and limits it to the sole surviving *adult* heir of mother. According to plaintiffs, that limitation demonstrates that defendants were on notice that mother may have had other heirs, and therefore defendants could not assert the bar of the one-action rule. Because we dispose of the appeal based on our conclusion that the one-action rule does not apply, we do not reach the merits of this contract interpretation issue.

By executing the release, Brown settled her wrongful death claim directly with Permanent General acting on behalf of its insureds, defendants, before any lawsuit was filed. Neither the minor plaintiffs nor their original guardian ad litem, Daniel Moody, ever met with attorney Yates.

After the settlement, plaintiffs filed a wrongful death action against the defendants. Defendants responded to plaintiffs' first amended complaint for wrongful death with a demurrer that the trial court granted with leave to amend. Defendants then demurred to the second amended complaint, but the trial court overruled that demurrer. Defendants next filed the motion for summary judgment that is the subject of this appeal. The trial court entered an order granting summary judgment in favor of defendants and a judgment based on that order. The trial court ruled that the one-action rule, which precludes multiple wrongful death actions against the same defendant by heirs of a decedent, barred the action. Plaintiffs have appealed.

DISCUSSION

A. Standard of Review

"We review the grant of summary judgment de novo. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19 [17 Cal.Rptr.2d 356].) We make 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222 [38 Cal.Rptr.2d 35].) A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has made such a showing, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v.*

Atlantic Richfield Co. (2001) 25 Cal.4th 826, 849, 853 [107 Cal.Rptr.2d 841, 24 P.3d 493].)" (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1216-1217.)

B. Applicable Legal Principles

1. Wrongful Death Statute

The California Supreme Court has described the nature of a wrongful death action in California as follows: "[Code of Civil Procedure s]ection 377.60 authorizes a wrongful death action by specified persons including the decedent's spouse and children. 'Unlike some jurisdictions wherein wrongful death actions are derivative, Code of Civil Procedure section 377.60 "creates a new cause of action in favor of the heirs as beneficiaries, based upon their own independent pecuniary injury suffered by loss of a relative, and distinct from any the deceased might have maintained had he survived. [Citations.]"' [Citation.] [¶] As was stated in *San Diego Gas & Electric Co. v. Superior Court* (2007) 146 Cal.App.4th 1545, 1551 [53 Cal.Rptr.3d 722], any wrongful death recovery 'is in the form of a lump sum verdict determined according to each heir's separate interest in the decedent's life [citation], with each heir required to prove his or her own individual loss in order to share in the verdict. ([Code of Civ. Proc.,] § 377.61; [citation].) Because a wrongful death action compensates an heir for his or her own independent pecuniary losses, it is one for "personal injury to the heir." [Citations.] Thus, in a wrongful death action the "injury" is not the general loss of the decedent, but the particular loss of the decedent to each individual claimant.'" (*Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 844.)

We recently explained the wrongful death claims procedures in *Adams v. Superior Court* (2011) 196 Cal.App.4th 71, 76-77: "The right to recover under a wrongful death theory is entirely statutory, and the wrongful death statutes create a new cause of action that did not exist in the common law. [Citation.] As specified in [Code of Civil Procedure] section 377.60, wrongful death actions may be brought by the heirs of the decedent or a personal representative on behalf of the heirs of the decedent. '"In stating

that an action for wrongful death is joint, it is meant that all heirs should join or be joined in the action and that a single verdict should be rendered for all recoverable damages; when it is said that the action is single, it is meant that only one action for wrongful death may be brought whether, in fact, it is instituted by all or only one of the heirs, or by the personal representative of the decedent as statutory trustee for the heirs; and when it is said that action is indivisible, it is meant that there cannot be a series of suits by heirs against the tortfeasor for their individual damages." [Citations.] [¶] Because there is only a single action for wrongful death, an heir bringing the action should join all known heirs. If an heir refuses to join as a plaintiff, he or she may be named as a defendant, so all heirs are before the court in the same action.' [Citations.] [¶] Defendants facing a wrongful death action in which all the heirs should have, but have not, been joined are entitled to move to abate the action. The California Supreme Court in holding that a wrongful death action by only a portion of the heirs is not the action authorized by statute said, 'All the heirs should, therefore, join as plaintiffs in an action by heirs, and if the consent of any one who should be so joined cannot be obtained, he may be made a defendant [([Code Civ. Proc.,] § 382)] . . . *where all the heirs are not joined, and timely objection is made on that ground by a defendant, the action should be abated, or, at least, the other heirs should be made parties*.' [Citations.]"

2. One-Action Rule

As explained above, it is well established that there can be only a single action for a wrongful death in which all heirs must join. Individual heirs cannot file a series of wrongful death suits. (*Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690, 693-694; *San Diego Gas & Electric Co. v. Superior Court, supra,* 146 Cal.App.4th at p. 1551; *Gonzales v. Southern Cal. Edison Co.* (1999) 77 Cal.App.4th 485, 489 (*Gonzales*).) "This is the so-called one action rule. One of its effects is that settlement of a wrongful death case instituted by only some of the heirs will bar others from prosecuting another action against the same defendant. [Citation.] After settlement of the action, heirs who were neither voluntarily nor involuntarily joined in it must instead seek a remedy against

the settling heirs, not the defendant. [Citation.]" (*Gonzales, supra,* 77 Cal.App.4th at p. 489.)

3. Waiver of the One-Action Rule

"The one action rule . . . is not jurisdictional, and its protections may be waived. (See *Cross v. Pacific Gas & Elec. Co., supra,* 60 Cal.2d at p. 692; *Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 807-808.) For example, 'a wrongful death settlement will not terminate the action if the settlement includes less than all of the named heirs. By settling with less than all of the known heirs, the defendant waives the right to face only a single wrongful death action and the nonsettling heirs may continue to pursue the action against the defendant.' (*Smith* [*v. Premier Alliance Ins. Co.*] (1995) 41 Cal.App.4th [696,] 698.) Similarly, if the defendant settles an action that has been brought by one or more of the heirs, with knowledge that there exist other heirs who are not parties to the action, the defendant may not set up that settlement as a bar to an action by the omitted heirs. [Citations.]" (*Gonzales, supra*, 77 Cal.App.4th at p. 489.)

C. Application of the One-Action Rule to Prelitigation Settlement

Plaintiffs' primary contention on appeal is that the one-action rule has no application to this case because Brown did not file a wrongful death lawsuit against defendants, but instead merely tendered a claim for policy benefits to their insurer. Thus, according to plaintiffs, there was no "one action" for wrongful death that could operate as a bar to their claims against defendants. Although there is no California decision directly on point,[7] we agree that the one-action rule should not apply to prelitigation settlements such as the one at issue here.

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[7] Both parties cite to and discuss *Spearman v. State Farm Fire & Casualty Co.* (1986) 185 Cal.App.3d 1105. That case is inapposite because it dealt with the substantive legal issue of a settling insurance carrier's duty to omitted heirs and not with the procedural issue of whether a prelitigation settlement of a wrongful death claim bars a subsequent wrongful death lawsuit by heirs omitted from the settlement. Even assuming that the court in *Spearman* suggested that a prelitigation settlement of an heir's wrongful

"[Code of Civil Procedure s]ection 377.60 and its predecessor statute, section 377, do not expressly prevent more than one cause of action by a decedent's heirs. Nevertheless wrongful death actions are considered to be 'joint, single and indivisible.' (*Valdez v. Smith* (1985) 166 Cal.App.3d 723, 726 [212 Cal.Rptr. 638]; *Smith v. Premier Alliance Ins. Co*. (1995) 41 Cal.App.4th 691, 697, fn. 8 [48 Cal.Rptr. 2d 461].)" (*Ruttenberg v. Ruttenberg, supra,* 53 Cal.App.4th at p. 807.) The Supreme Court, in applying the wrongful death statute,[8] articulated the one-action rule when it held that "only one action for wrongful death may be brought . . . there cannot be a series of suits by heirs against the tortfeasor for their individual damages." (*Cross v. Pacific Gas & Elec. Co., supra,* 60 Cal.2d at p. 694.) Thus, in determining the applicability of the one-action rule, we refer to the definition of the term "action." "An 'action,' is defined as 'an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' ([Code Civ. Proc.,] § 22[.]) . . . With respect to civil actions, 'an "action" means the same thing as a "suit." [Citation.]' [Citations.] . . . [T]he Legislature used the terms 'civil action' and 'civil suit' interchangeably in this context." (*People v. Yartz* (2005) 37 Cal.4th 529, 536.) This statutory definition suggests that the action referred to in the one-action rule is a civil suit for wrongful death brought pursuant to Code of Civil Procedure section 377.60. Although Code of Civil Procedure section 377.60 refers to "a cause of action," the judicially developed one-action rule concerns only "actions" or "suits" (*Cross v. Pacific Gas & Elec. Co., supra,* 60 Cal.2d at p. 694), and not a prelitigation claim or cause of action.[9]

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death claim against an insured would operate as a bar to a subsequent wrongful death lawsuit by a different heir of the decedent, such suggestion was dictum.

8 The wrongful death statute at the time was Code of Civil Procedure section 377.

9 "A cause of action, sometimes called a 'thing in action,' 'is a right to recover money or other personal property by a judicial proceeding.' (Civ. Code, § 953.)" (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th

Brown did not bring a wrongful death suit against defendants prior to plaintiffs' suit. Instead, she tendered a claim on her own behalf to defendants' insurance carrier that the carrier voluntarily settled on defendants' behalf. Under these circumstances, that claim and voluntary settlement cannot fairly be characterized as a civil suit or action for wrongful death to which the one-action rule applies.

This conclusion is consistent with the case law that generally has applied the one-action rule to subsequent wrongful death actions filed after the settlement or disposition of a *prior* wrongful death *action*. (See e.g. *Mayerhoff v. Kaiser Foundation Health Plan, Inc*. (1977) 71 Cal.App.3d 803 [settlement and dismissal of prior wrongful death action by decedent's husband and child barred subsequent wrongful death action by decedent's parents].) Under these authorities, the one-action rule operates as a procedural protection that arises only after a tortfeasor has been sued in a wrongful death action requiring the joinder of all heirs. Thus, for a defendant in a wrongful death action to avail himself or herself of the benefit of that rule, he or she must first have been subjected to potential liability in a previous wrongful death action.

Here, defendants had not been subjected to liability in a wrongful death action, which required the joinder of all of mother's heirs prior to the filing of plaintiffs' suit. Rather, they were subjected only to Brown's claim which was made to their insurance carrier for policy benefits for herself alone. Although the claims adjustment process required Brown to be honest with respect to the material representations she made in

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993, 1001; see Black's Law Dict. (9th ed. 2009) p. 275 [defining "chose in action" as "[t]he right to bring an action to recover a debt, money, or thing"].) A cause or chose in action can accrue, even if a claim has not been filed or a judicial determination has not been made. Instead, only a right to recover must exist. (See, e.g. *Krusi v. S.J. Amoroso Construction Co.* (2000) 81 Cal.App.4th 995, 1003 [equating a chose in action with a right to bring a lawsuit].)

support of her claim,[10] there is no statutory or decisional procedural requirement that all of mother's heirs be joined in or made part of either the claims or settlement process.

If defendants wanted the procedural protections of the one-action rule to which they now contend they are entitled, they should have required Brown to file a wrongful death action. Had defendants required Brown to file such an action before the settlement, Brown would have been under a legal duty to join the minor plaintiffs. If she failed to comply with the wrongful death statute and join the minors, she would have been exposed to liability to them under that statute if they were omitted from a settlement of the action. (See *Smith v. Premier Alliance Ins. Co., supra,* 41 Cal.App.4th at p. 697.) Under existing authorities, as long as defendants were not made aware of the existence of the minor plaintiffs during pendency of Brown's wrongful death action, defendants would have been entitled to the benefit and protection of the one-action rule. (See *Gonzales, supra,* 77 Cal.App.4th at p. 489.)

Contrary to defendants' assertions concerning public policy, requiring a settling wrongful death tortfeasor to insist on the filing of a wrongful death action before permitting that tortfeasor to avail himself or herself of the protections of the one-action rule will not contravene the policy favoring early settlement of disputes. Tortfeasors such as defendants will still be at liberty to settle wrongful death claims without the instigation of litigation; but if they do so, they will not have the procedural protection afforded by the one-action rule. Thus, for example, an alleged tortfeasor who has done due diligence in identifying all potential heirs, including, perhaps, requiring a sworn statement as to the existence or nonexistence of other heirs, may choose to run the risk of settling without the expense or inconvenience of a lawsuit. But that risk entails the possibility of an heir

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10 Brown's representation to Permanent General that she was mother's sole heir would appear to contravene California law governing her insurance claim. (See, e.g., Ins. Code, § 1871 et seq.; *State of California ex rel. Nee v. Unumprovident Corp*. (2006) 140 Cal.App.4th 442, 449 ["taken as a whole, section 1871 et seq. is specifically tailored toward preventing and punishing the making of fraudulent claims to insurance companies"].)

omitted from that settlement thereafter coming forward and filing a wrongful death action, exposing the tortfeasor to liability to that heir in that action.

This conclusion concerning prelitigation settlements of wrongful death claims strikes a fair balance between the rights of heirs to be included in wrongful death claims and the rights of alleged tortfeasors to be free from multiple claims for wrongful death. As the facts of this case illustrate, had defendants insisted that Brown file a wrongful death action prior to the settlement, Brown would have had a strong procedural incentive to join the minor plaintiffs, as well as to avoid the concealment of their existence, due to the formality of the civil proceeding and the potential consequences of making material misrepresentations in the court record. Although the filing of a wrongful death lawsuit by one heir may not always guarantee that the rights of all potential heirs will be protected in that action, the joinder requirement under Code of Civil Procedure section 377.60 provides a reasonable procedural protection for heirs by subjecting the heir who filed the wrongful death lawsuit to liability in the event such potential heirs are not joined in the action and are omitted from the award or settlement. (*Gonzales, supra,* 27 Cal.App.4th at p. 489; *Smith v. Premier Alliance Ins. Co., supra,* 41 Cal.App.4th at p. 697.)

Moreover, the filing of a lawsuit—a matter of public record—at least increases the chance that heirs who are not joined may nevertheless become aware of the pendency of a wrongful death claim of another heir. The minor plaintiffs should not be stripped of their wrongful death claims against defendants based on a private deal worked out between an insurance adjustor and a less than candid heir before any litigation had been commenced.

Accordingly, because defendants were not entitled to raise the one-action rule as a bar to plaintiffs' wrongful death action, the order granting summary judgment and the judgment based on it are reversed.

DISPOSITION

The order granting summary judgment in favor of defendants and the judgment are reversed. Plaintiffs are awarded their costs on appeal.

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MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.